Request Requested

No. 01-10940 (3)

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IN THE SUPREME COURT OF THE UNITED STATES

JAMES EDWARD PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's trial and appellate counsel were ineffective for failing to challenge his conviction under 18 U.S.C. 924(c) on the ground that he did not commit a predicate felony drug trafficking crime.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unpublished, but the judgment is noted at 31 Fed. Appx. 158 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2001. A petition for rehearing was denied on March 20, 2002. The petition for a writ of certiorari was filed on June 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of possession of cocaine base, in violation of 21 U.S.C. 844(a), and using or carrying a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c). He was sentenced to 63 months' imprisonment on the drug possession count, and to a consecutive term of 60 months' imprisonment on the firearm count. The court of appeals affirmed. United States v. Price, 180 F.3d 266 (5th Cir.) (Table), cert. denied, 528 U.S. 944 (1999).

Petitioner then filed a motion for collateral relief under 28 U.S.C. 2255. The district court denied the motion. The court of appeals granted a certificate of appealability (COA) and vacated petitioner's sentence on the drug possession count, but affirmed the denial of petitioner's motion with respect to the firearm count. Pet. App. A, 1-4.

1. On February 20, 1998, a police officer in Hillsboro, Texas stopped petitioner for a traffic violation. When the officer noticed a gun magazine on the dashboard of petitioner's truck, he asked petitioner if there were any weapons in the vehicle, and petitioner showed him a handgun inside a console in the front seat. Petitioner was arrested and transported to the

police station, where officers discovered 78 rocks of crack cocaine hidden in one of petitioner's socks. Gov't C.A. Br. 4-6; Presentence Report (PSR) ¶¶ 4-10.

2. A federal grand jury returned an indictment charging petitioner with possession of cocaine base with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (Count One), and using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c) (Count Two). Pet. App. A, 1-2; C.A. App. Tab 2. At trial, petitioner stipulated that the substance seized by the Hillsboro police was "6.7 grams of cocaine base." Gov't C.A. Br. 5; Trial Tr. (8/5/98) 20-21. Petitioner testified in his own defense, claiming that he had found the cocaine base on the street and had intended to take it to a local law enforcement officer when he was stopped by the police. Gov't C.A. Br. 6; Trial Tr. (8/5/98) 75-78.

With respect to the drug trafficking count, the district court instructed the jury that, if it did not find beyond a reasonable doubt that petitioner intended to distribute the cocaine base, it could find him guilty of the lesser included offense of possession of cocaine base. Pet. App. A, 2; C.A. App. Tab 4. With respect to the firearm count, the court explained that, in order to return a guilty verdict, the jury

had to find that petitioner "committed the crime alleged in Count One of the Indictment" and that he "knowingly used or carried a firearm during and in relation to [his] alleged commission of the crime charged in Count One of the Indictment." C.A. App. Tab 5. In response to a question from the jurors, the court stated that "[a] 'drug trafficking crime' means any felony punishable under the Controlled Substances Act. Possession with intent to distribute cocaine base and possession of more than five grams of cocaine base are both felony offenses." C.A. App. Tab 6. The jury found petitioner not guilty of possession of cocaine base with intent to distribute, but guilty of simple possession of cocaine base and guilty on the firearm count. Pet. App. A, 2; C.A. App. Tab 7.

The presentence report determined that petitioner's drug possession offense involved 6.67 grams of crack cocaine, resulting in a base offense level of 26 under Guidelines § 2D1.1(c)(7). PSR ¶¶ 20-21; see Guidelines § 2D2.1(b)(1) (providing that a defendant convicted of possession of more than five grams of cocaine base should be sentenced under Section 2D1.1 "as if the defendant had been convicted of possession * * * with intent to distribute"). The report also determined that petitioner fell within criminal history category I, although it noted that he had several prior state

convictions, including a 1976 conviction for possession of marijuana and a 1988 conviction for possession of a controlled substance.[1] PSR ¶¶ 32-36. Thus, petitioner's Guidelines sentencing range on Count One was 63 to 78 months' imprisonment. PSR ¶ 62. The district court adopted the factual findings and guidelines applications in the presentence report, and sentenced petitioner to 63 months' imprisonment on Count One and to a consecutive term of 60 months' imprisonment on Count Two. Sent. Tr. (10/1/98) 10; C.A. App. Tab 8.

On appeal, petitioner argued that the evidence was insufficient to prove the requisite nexus between the firearm and the drug offense, that the district court erred in instructing the jury on the "in relation to" element of the firearm offense, and that the district court should have required the jury to continue to deliberate after it returned a verdict form that was altered.[2] Pet. App. A, 2; C.A. App. Tab 10. The court of appeals affirmed, United States v. Price, 180 F.3d 266 (5th Cir.) (Table), and this Court denied certiorari,

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[1] The report noted that petitioner stated during the presentence interview that the 1988 conviction was later dismissed. PSR ¶ 35.

[2] Consistent with the district court's instructions on the firearm offense, the jury changed the description of Count Two on the verdict form from "Using and Carrying a Firearm" to "Using or Carrying a Firearm." C.A. App. Tab 7.

528 U.S. 944 (1999).

3. In 1999, petitioner filed a motion for collateral relief under 28 U.S.C. 2255. C.A. App. Tabs 11-13. He claimed that his sentence on the drug possession count exceeded the one-year statutory maximum under 21 U.S.C. 844(a); that the drug possession offense was a misdemeanor, not a felony, and therefore did not constitute a valid predicate "drug trafficking crime" under Section 924(c); that his trial and appellate counsel were ineffective in failing to raise those claims; and that the government violated Brady v. Maryland, 373 U.S. 83 (1963), by failing to point out that his sentence exceeded the statutory maximum. Pet. App. A, 2; see C.A. App. Tabs 11-13. The district court denied the Section 2255 motion and rejected petitioner's request for a COA. Pet. App. A, 2. The court of appeals granted a COA on petitioner's ineffective assistance claims and reversed in an unpublished per curiam decision. Pet. App. A, 1-4.

a. With respect to the drug possession count, the court concluded that petitioner's 63-month sentence exceeded the statutory maximum under 21 U.S.C. 844(a), and that his trial and appellate attorneys rendered ineffective assistance by failing to cite "directly controlling precedent" to that effect. Pet. App. A, 2-4 (citing United States v. Deisch, 20 F.3d 139 (5th

Cir. 1994), overruled on other grounds, United States v. Doggett, 230 F.3d 160, 164-165 (5th Cir. 2000)). Section 844(a) establishes a maximum penalty of one to three years' imprisonment for possession of any quantity of a "controlled substance," but increases the maximum to 20 years for those convicted of possessing more than five grams of cocaine base.[3] Petitioner's sentence of 63 months' imprisonment was imposed on the basis of that 20-year maximum. The court held that such a sentence was erroneous: Under Deisch, possession of more than five grams of cocaine base "'cannot be a lesser included offense under an indictment charging possession with intent to

[3] Section 844(a) provides, in pertinent part:

> Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, * * * except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years, * * * except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for * * * not more than 3 years * * * . Notwithstanding the preceding sentence, a person convicted under this subsection for possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years * * * if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams * * * .

distribute in violation of section 841(a)(1),'" because drug type and quantity are elements of the former offense but not the latter. Pet. App. A, 3 (quoting Deisch, 20 F.3d at 152). Nevertheless, the court explained, petitioner properly could have been sentenced to up to three years' imprisonment under Section 844(a)'s general prohibition on possession of a controlled substance. It remanded for resentencing on that count. Pet. App. A, 4.[4]

b. With respect to the firearm count, petitioner argued that his attorneys were ineffective in failing to challenge his conviction on the ground that his drug possession offense was not a felony and therefore could not serve as a predicate "drug trafficking crime" under Section 924(c). Pet. App. A, 4; see 18 U.S.C. 924(c)(2) (defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act"). A federal offense is classified as a felony if the "maximum term of imprisonment authorized" is more than one year. 18 U.S.C. 3559(a); see also 21 U.S.C. 802(13) (defining "felony" for

[4] On re-sentencing, the district court sentenced respondent to 24 months' imprisonment on the Section 844 count, based on the enhanced penalty for recidivists. Re-sent. Tr. (5/22/02) 14. Respondent has appealed that sentence on the ground that the enhancement provision is inapplicable where, as here, the government did not file the requisite notice under 21 U.S.C. 851(a). Petitioner's Section 924(c) conviction is not at issue in the pending appeal.

purposes of the Controlled Substances Act as "any Federal or State offense classified by applicable Federal or State law as a felony"). Petitioner maintained that his drug possession offense could not be so classified because Section 844(a) prescribes a base penalty of "not more than 1 year."

The court of appeals rejected that argument. It explained that, although possession of a controlled substance would be a misdemeanor for a first-time offender, Section 844(a) authorizes a sentence of up to three years in cases where the defendant has prior drug-related convictions. Pet. App. A, 4. According to the presentence report, petitioner pleaded guilty to drug offenses in 1976 and 1988.[5] Pet. App. A., 4 n.7. Therefore, the court concluded, "[h]ad [petitioner] been correctly sentenced under § 844(a), the [district] court would have noted his two prior drug convictions" and petitioner "would have faced a statutory maximum of either two or three years, rendering his drug possession a felony under § 924(c)(1)." Pet. App. A, 4 (footnote omitted).

Petitioner filed a petition for rehearing, arguing that despite his prior convictions, his drug possession offense was subject to the one-year statutory maximum because the government

[5] The court noted that petitioner claimed that the "latter conviction has been vacated." Pet. App. A, 4 n.7.

had not filed an information pursuant to 21 U.S.C. 851 setting forth his prior convictions. See 21 U.S.C. 851(a) ("No person [convicted of a drug offense] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."). The court of appeals denied the petition without opinion. Pet. App. B.

ARGUMENT

Petitioner contends (Pet. 6-8) that the court of appeals erred in upholding his conviction under 18 U.S.C. 924(c) because, given the government's failure to provide the notice required by 21 U.S.C. 851(a), his drug possession offense could not carry a sentence of more than one year and therefore could not serve as a predicate "drug trafficking crime" under Section 924(c).[6] We agree with petitioner that, in the absence of proper

[6] Petitioner raised that argument for the first time in his petition for rehearing. In its response, the government did not defend the reasoning of the court of appeals, but argued instead that petitioner waived his Section 851 claim by failing to present it in his 28 U.S.C. 2255 motion or in his briefs on appeal, and that the court of appeals' judgment was correct in any event because "[t]here was overwhelming evidence of the distribution offense" and of the lesser offense of "possession of the stipulated amount of 6.7 grams of crack cocaine," either of which could serve as a predicate felony drug

notice under 21 U.S.C. 851(a), the drug possession offense did not qualify as a felony for purposes of Section 924(c). Nevertheless, petitioner is not entitled to relief on his claim of ineffective assistance of counsel because, even assuming deficient performance by counsel in not raising an objection to the use of the drug possession charge to support the verdict under Section 924(c), petitioner cannot show prejudice: there is no reasonable probability that a rational jury would have failed to find that he possessed the cocaine base with the intent to distribute. Accordingly, the judgment below is correct and the court of appeals' unpublished decision does not warrant this Court's review.

1. The court of appeals rejected petitioner's ineffective assistance of counsel challenge to his Section 924(c) conviction on the ground that, had petitioner properly been sentenced under the provision of Section 844(a) prescribing penalties for simple possession of a controlled substance, his prior convictions would have exposed him to a maximum penalty of two to three years' imprisonment, making his possession offense a felony for purposes of Section 924(c). See Pet. App. A, 4. That reasoning is incorrect. Section 924(c)(2) provides that, "[f]or purposes

trafficking offense for purposes of Section 924(c). Gov't C.A. Resp. Br. 5-6, 8-9; see also Gov't C.A. Br. 15-18. The court of appeals denied rehearing without opinion. Pet. App. B.

of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act." A drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a). Because no such notice was filed in this case, the court of appeals erred in concluding that petitioner's drug possession offense qualified as a predicate felony under Section 924(c).

Petitioner also argues that the court of appeals' decision conflicts directly with this Court's holding in United States v. LaBonte, 520 U.S. 751 (1997). In LaBonte, the Court addressed the meaning of 28 U.S.C. 994(h), which directs the Sentencing Commission to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants" in cases involving certain repeat offenders. The Sentencing Commission had interpreted that provision to mean that, where Congress enacted a base penalty for first-time offenders and an enhanced penalty for recidivists, the base sentence was the "maximum term authorized" for all defendants convicted of the same crime. LaBonte, 520 U.S. at 754-755. The Court rejected that view, holding that, for repeat drug offenders who received the proper notice under

21 U.S.C. 851(a), "the 'maximum term authorized' is the enhanced term." Id. at 759-760. The Court made clear, however, that for first-time offenders and "defendants who did not receive the notice, the unenhanced maximum applies." Id. at 760. While LaBonte arose in a different statutory context and is not controlling here, its reasoning supports the conclusion that petitioner's drug possession offense could not be treated as a felony by virtue of petitioner's recidivism, given the government's failure to file a notice of enhancement under 21 U.S.C. 851(a).

2. Nevertheless, this case does not warrant further review. The court of appeals' unpublished opinion has no precedential effect, even within the Fifth Circuit, see 5th Cir. R. 47.5.4, and its judgment is correct. The question before the court of appeals was whether petitioner's trial and appellate counsel were ineffective for failing to challenge his Section 924(c) conviction on the grounds petitioner now advances. In order to prevail on that claim, petitioner must establish that counsel's performance "fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Petitioner has not satisfied that

standard.

At trial, in response to a question from the jury, the court instructed that the jury could find petitioner guilty under Section 924(c) based on his use of a gun in connection with either of two drug trafficking offenses: possession with intent to distribute, or possession of more than five grams of cocaine base. The government assumes for purposes of this case that counsel was deficient in failing to object to the inclusion of the possession offense as a possible predicate for the Section 924(c) charge. Nevertheless, petitioner cannot show prejudice under the Strickland standard. Any rational jury that found that petitioner possessed the cocaine base that was concealed in his sock, and that rejected petitioner's explanation that he had found the drugs on the street, also would have concluded that he possessed the drugs with intent to distribute.

The evidence presented at trial showed that, when he was arrested, petitioner had more than 70 rocks of "crack" cocaine hidden in his sock, that the typical user buys only one or two rocks at a time, and that the drugs in petitioner's possession had a street value of up to $1,200. Trial Tr. (8/5/98) 60. The jury also heard testimony that the pistol found in petitioner's vehicle -- an inexpensive model that the government's witness described as "basically a throw-down gun" -- was the type of

weapon often carried by "mid-level" and "smaller" dealers in order to "protect themselves from other drug dealers or being ripped off." Id. at 61. That evidence overwhelmingly established that petitioner possessed the cocaine base with intent to distribute it, and that he "use[d] or carr[ied] a firearm during and in relation to the commission of [that] drug trafficking crime." C.A. App. Tab 7.

It is immaterial that the jury chose not to find petitioner guilty on the separate charge of possession with intent to distribute; juries are entitled to render compromise verdicts, and "[i]nconsistency in a verdict is not a sufficient reason for setting it aside." Harris v. Rivera, 454 U.S. 339, 345 (1981); see also United States v. Powell, 469 U.S. 57 (1984) (reaffirming general rule that inconsistent verdicts can stand). A defendant may be convicted under Section 924(c) even if the government did not obtain a conviction on the predicate drug trafficking offense. "[I]t is only the fact of the offense, and not a conviction, that is needed to establish the required predicate." United States v. Munoz-Fabela, 896 F.2d 908, 911 (5th Cir. 1990); cf. United States v. Ruiz, 986 F.2d 905, 911 (5th Cir. 1993) (affirming Section 924(c) conviction despite acquittal on drug trafficking charge). Accordingly, petitioner cannot demonstrate a reasonable probability that the result of

the proceedings would have been different had counsel argued that a simple drug possession offense cannot serve as a valid predicate for a conviction under Section 924(c), or that his conviction was invalid given his acquittal on the charge of possession with intent to distribute. See Strickland, 466 U.S. at 694.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2002

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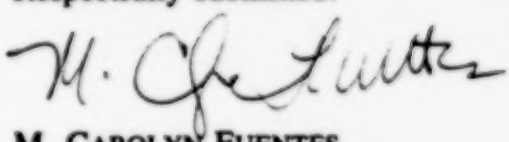
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES Petitioner James Edward Price, by and through his undersigned attorney, and pursuant to Rule 39.1, Supreme Court Rules, and Title 18, United States Code, § 3006A(d)(6), respectfully moves this Honorable Court for leave to proceed *in forma pauperis,* and to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of fees. Petitioner was represented by appointed counsel under the Criminal Justice Act of 1964,

as amended, in the district court and the court of appeals. Leave to proceed *in forma pauperis* was never sought in any other court.

Respectfully submitted.



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DATED: June 18, 2002.